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COURT OF CRIMINAL APPEALS
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COURT OF CRIMINAL APPEALS
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IN THE TEXAS COURT OF CRIMINAL APPEALS

CRAIG DOYAL,

Appellees,

VS.

THE STATE OF TEXAS,

Appellant.

DISCRETIONARY REVIEW FROM THE NINTH COURT OF APPEALS
Cause no. 9-17-00123-CR

BRIEF OF AMICUS CURIAE FREEDOM OF INFORMATION FOUNDATION OF TEXAS IN SUPPORT OF APPELLANT'S MOTION FOR REHEARING

Paul C. Watler
State Bar No. 20931600
pwatler@jw.com
JACKSON WALKER L.L.P.
2323 Ross Avenue, Suite 600
Dallas, Texas 75201
(214) 953-6000 / (214) 953-5822 fax

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COUNSEL FOR AMICUS CURIAE FREEDOM OF INFORMATION FOUNDATION OF TEXAS

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IDENTITY OF PARTIES AND COUNSEL

Appellant:

State of Texas

Attorneys for Appellant:

Chris Downey
The Downey Law Firm
State Bar No. 00787393
2814 Hamilton Street
Houston, Texas 77004
713-651-0400 (w)
713-395-1311 (f)

David Cunningham
State Bar No. 05234400
2814 Hamilton
Houston, Texas 77004
713-225-0325 (w)
713-391-1311 (f)

Joseph R. Larsen
Gregor Cassidy, PLLC
State Bar No. 11955425
700 Louisiana, Suite 3950
Houston, TX 77002
713-306-1937 (w)
832-390-2655 (f)

Appellees:	Attorneys for Appellees:
Craig Doyal	Mr. Russell "Rusty" Hardin, Jr. State Bar No. 08972800 rustyhardin@rustyhardin.com Ms. Naomi Howard State Bar No. No. 24092541 nhoward@rustyhardin.com Rusty Hardin & Assoc, PC 5 Houston Center 1401 McKinney St., Ste. 2250 Houston, TX 77010 (713) 652-9000
Charlie Riley	Mr. W. Troy McKinney State Bar No. 13725020 Schneider & McKinney, PC 440 Louisiana St., Ste. 800 Houston, TX 77002 (713) 951-9994 Mr. Doug Atkinson State Bar No. 24006773 Douglas W. Atkinson and Associates, PLLC 322 Metcalf Street Conroe, TX 77301 (936) 760-0303
Marc Davenport	Mr. Stephen Jackson State Bar No. 00784324 steve@stevejacksonlaw.com Mr. Michael Matlak SBOT No. 24053978 michael@stevejacksonlaw.com Law Offices of Stephen D. Jackson & Assoc. 215 Simonton St. Conroe, TX 77301

(936) 756-5744

Amicus Curiae:	Attorneys:
Freedom of Information Foundation of Texas	Paul C. Watler State Bar No. 20931600 pwatler@jw.com Eric D. Wong State Bar No. 24102659 ewong@jw.com JACKSON WALKER L.L.P. 2323 Ross Avenue, Suite 600 Dallas, Texas 75201 (214) 953-6000 / (214) 953-5822 fax

STATEMENT OF INTEREST OF AMICUS CURIAE

The Freedom of Information Foundation of Texas ("FOIFT" or the "Foundation") is a nonprofit Texas corporation based in Austin. The Foundation represents members statewide who are concerned about open government and the free flow of information. Its board of directors includes journalists, lawyers, academics, and members of the general public.

Since its formation in 1978 as an outgrowth of the Dallas Press Club, the Foundation's mission has been to serve as a statewide clearinghouse for information on open government and the First Amendment. In particular, the Foundation has a long history of public education and advocacy in connection with the Texas Public Information Act and Texas Open Meetings Act.[1]

[1] No fee has been paid for the preparation of this brief. *See* Tex. R. App. P. 11(c).

INTRODUCTION

Texas claims a proud political heritage that has always demanded candor and accountability from elected officials. Writing through the night on March 1, 1836, hastened by infamous events transpiring to the west, leaders of the revolution committed to paper the abuses compelling them to break away from their increasingly distant and furtive government. Chief among their grievances was the depression of basic liberties taking place "through a jealous and partial course of legislation, carried on at a far distant seat of government, by a hostile majority, in an unknown tongue." TEXAS DECLARATION OF INDEPENDENCE at 4 (1836). Citizen participation and oversight has been a defining feature of Texas government ever since.

The provision of the Texas Open Meetings Act at issue in the present appeal is a modern affirmation of that old commitment. It punishes and discourages elected officials who would circumvent the Act's substantive requirements and thereby reduce our tradition of public debate to an act of theatre. Every effort must be made to preserve the Legislature's implementation of the people's will in this regard, and if a reasonable interpretation that would save the statute can be found, it must be applied. Because such an interpretation appears to exist in this case, the State's motion for rehearing is well-taken and should be granted.

ARGUMENT

Section 551.143 of the Texas Open Meetings Act ("TOMA" or "the Act") is part of a carefully measured statutory scheme that masterfully balances and preserves two indelible constitutional guarantees: the right of elected officials to speak and the right of the public to know. *See* U.S. Const., amend I; *Tovar v. State*, 978 S.W.2d 584, 587 (Tex. Crim. App. 1998); *Globe Newspaper Co. v. Superior Court for Norfolk Cty.*, 457 U.S. 596, 604 (1982) ("the First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government"). The Act secures these freedoms by mandating that governmental bodies deliberate official business at public meetings rather than in a series of clandestine gatherings, while also carving out incidental discussions and imposing strict scienter requirements that dramatically limit the scope of restricted speech.

This mechanism of operation is neither vague nor overbroad, as interpretations by both the Attorney General's Office and other courts have made clear. Because it is the Court's obligation to save TOMA if any such interpretation is reasonably sound, the State's motion for rehearing should be granted. An issue of such public import merits a second look.

I. TOMA contains common-sense prohibitions that restrict the minimum amount of speech necessary to prevent "walking quorums."

The State has ably described TOMA's method of operation, *see* Mot. for Rehearing at 4–6, as have the Attorney General and courts in the Texas and federal systems. *See* Tex. Atty. Gen. Op., No. GA-326 at 3-4 (2005); *Harper v. Best*, 493 S.W.3d 105, 117 (Tex. App.—Waco 2016), *aff'd as modified*, 562 S.W.3d 1 (Tex. 2018); *Foreman v. Whitty*, 392 S.W.3d 265, 277 (Tex. App.—San Antonio 2012, no pet.); *Esperanza Peace & Justice Center v. City of San Antonio*, 316 F. Supp. 2d 433, 474 (W.D. Tex. 2001).

Applying this construction, members of a governmental body violate the Act when they purposefully meet in a series of small groups to discuss official business among what adds up to a quorum of members—a "deliberation."[2] *See Harper*, 493 S.W.3d at 117; Tex. Atty. Gen. Op., No. GA-326 at 3–4. This prohibition of so-called "walking quorums" is not beyond the grasp of the average Texan. *See, e.g., King Street Patriots v. Tex. Democratic Party*, 521 S.W.3d 729, 743–44 (Tex. 2017) (discussing the public's ability to comprehend and apply arguably "circular" statutory definitions).

[2] In addition to the above authorities, the list of opinions recognizing this method of operation now includes the concurrence and dissent filed with the Court's February 27th opinion. *See State v. Doyal*, No. PD-0254-18, 2019 WL 944022, at *10, 22 (Tex. Crim. App. Feb. 27, 2019) (Slaughter, J., concurring) (Yeary, J., dissenting).

Statutes and regulations are often complex as a matter of necessity, but complexity itself is not tantamount to vagueness. *See Ex parte Ellis*, 309 S.W.3d 71, 89–90 (Tex. Crim. App. 2010) (rejecting vagueness arguments based on "the interplay of several provisions of the Election Code"); *see also United States v. Zhi Yong Guo*, 634 F.3d 1119, 1123 (9th Cir. 2011) ("a statute does not fail the vagueness test simply because it involves a complex regulatory scheme, or requires that several sources be read together"). The law gives us credit for our ability to reason, and "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ex parte Ellis*, 309 S.W.3d at 86 (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008)). Though they may require cross-referencing and appreciation of subtle lexical distinctions, TOMA's prohibitions are intuitive in context. *See Doyal*, 2019 WL 944022, at *27 (Yeary, J., dissenting).

The majority opinion raises legitimate concerns and critiques regarding the Act's draftsmanship. *See id.* at *10. It also pays due respect to the prerogative of the Legislature. *See id.* But the inverse implication of this legislative deference is the Court's duty to apply any available saving interpretation to the Legislature's enactments. *See Ex Parte Ingram*, 533 S.W.3d 887, 895 (Tex. Crim. App. 2017) ("we have a duty to employ, if possible, a reasonable narrowing construction in order

to avoid a constitutional violation"); *see also Yorko v. State*, 690 S.W.2d 260, 270 (Tex. Crim. App. 1985) (Teague, J., dissenting) ("this Court does not sit as a superlegislative body to determine the desirability or propriety of statutes enacted by the Legislature . . . Courts favor the constitutionality of statutes and the cardinal principle of statutory construction is to save, not to destroy").

Section 551.143 represents Texans' only statutory protection against the logistical gamesmanship described by the State. *See* Mot. for Rehearing at 5–7. A law of such fundamental importance cannot be cast aside because it might have been worded differently. *See Ex parte Jimenez*, 317 S.W.2d 189, 195 (Tex. 1958) ("conceding some artlessness in the draftsmanship of Art. 9.02, we also reject the point that it is so vague and confusing as to be void"); *see also Rocky Mountain Retail Mgmt., LLC v. City of Northglenn*, 393 P.3d 533, 539 (Colo. 2017); *Meade v. Commonwealth*, 813 A.2d 937, 941 (Penn. 2002). In this case, the interpretation outlined by the State has hitherto been accepted by the Attorney General and each court to review the Act.[3] *See* Tex. Atty. Gen. Op., No. GA-326 at 3–4; *Harper*, 493 S.W.3d at 117; *Esperanza Peace & Justice Center*, 316 F. Supp. 2d at 474; *see also*

[3] The stated objective of the Act, *see* Tex. Gov't Code § 551.002, and the Attorney General's construction of section 551.143 merit substantial deference in this instance. *See Lang v. State*, 561 S.W.3d 174, 180 (Tex. Crim. App. 2018) (listing factors to be considered in interpreting ambiguous statutes).

Acker v. Tex. Water Comm'n, 790 S.W.2d 299, 300 (Tex. 1990) ("the explicit command of the statute is for openness at every stage of the deliberations"). This Court should now lend its imprimatur to that interpretation, and settle the matter for all Texans.

II. Section 551.143 is incredibly narrow, and a violation is difficult to prove.

While the majority opinion rested on vagueness, the scope of the Act under the State's interpretation should also inform the Court's construction. *See* Tex. Gov't Code § 311.023(5); (6). As recognized by both Texas and federal courts, "[t]he Open Meetings Act may not, and does not, restrict or abridge protected speech," it merely regulates when and where a quorum of a governmental body can deliberate in its official capacity. *Hays Cty. Water Planning P'ship v. Hays Cty.*, 41 S.W.3d 174, 182 (Tex. App.—Austin 2001, pet. denied); *see also Asgeirsson v. Abbott*, 696 F.3d 454, 465–66 (5th Cir. 2012). "One board member asking another board member her opinion on a matter does not constitute a deliberation of public business," and a "per se violation of the Act does not occur when members of a governmental body confer one-on-one outside of a posted meeting, unless the members meet in less than a quorum ***with the intent to evade*** the Act's requirements." *Foreman*, 392 S.W.3d at 277 (emphasis added); *see also Harper*, 493 S.W.3d at 117.

To be foreclosed by Section 551.143, speech must therefore: (1) be uttered by a member of a governmental body; (2) to other members, but not a quorum; (3) with the ***specific intent*** of evading TOMA's substantive provisions; and (4) concern the body's public duties. *See Harper*, 493 S.W.3d at 117; Tex. Atty. Gen. Op., No. GA-326 at 3–4 (2005). The Legislature could not have drawn the circle any tighter. *See id.*

National interpretations of similar legislation confirm as much—requiring deliberation of official business to take place at open meetings does not abridge speech in violation of the First Amendment. In addition to Texas and the federal government, every other state has adopted some form of open meetings legislation, as has the District of Columbia. *See Disabato v. S.C. Ass'n of Sch. Adm'rs*, 746 S.E.2d 329, 339 (S.C. 2013) (listing statutes).[4] These laws together reflect a national commitment to open government, and have repeatedly faced and withstood the same flawed First Amendment attacks that Appellees levied against TOMA.

In South Carolina, for example, the state Supreme Court ruled that the South Carolina act "is a content-neutral statute that serves important governmental interests and does not burden substantially more speech than necessary . . ." *Disabato*, 746

[4] *see also State open meetings laws*, BALLOTPEDIA, (last visited May 1, 2019), https://ballotpedia.org/State_open_meetings_laws.

S.E.2d at 341. The Nevada Supreme Court ruled against a similar challenge, noting that: "requiring regents to comply with Nevada's Open Meeting Law does not infringe on their First Amendment rights," as they are "free to speak on any topic of their choosing, provided they place the topic on the [required] agenda." *Sandoval v. Bd. of Regents of the Univ. & Cmty. Coll. Sys. of Nev.*, 67 P.3d 902, 907 (Nev. 2003). Similar results have been obtained in Minnesota, *see St. Cloud Newspapers, Inc. v. Dist. 742 Cmty. Sch.*, 332 N.W.2d 1, 7 (Minn. 1983) ("The Open Meeting Law does not violate the rights of free speech or free assembly under the First Amendment"), and Colorado. *See Cole v. State*, 673 P.2d 345, 350 (Colo. 1983) ("the [Colorado] Open Meetings Law strikes the proper balance between the public's right of access to information and a legislator's right to freedom of speech").

The verdict across jurisdictions is clear and unanimous: First Amendment rights "protect the expression of ideas, not the right to conduct public business in closed meetings." *St. Cloud Newspapers, Inc.*, 332 N.W.2d at 7. TOMA restricts only the latter, meaning the State's interpretation of section 551.143 is a legitimate alternative to striking the statute down. *See id.*; *Hays Cty. Water Planning P'ship*, 41 S.W.3d at 182. Unless patently unreasonable, it must be applied.

CONCLUSION

As construed by the State and Court of Appeals, TOMA prohibits government officials from assembling secret majorities to conclude public affairs without citizen scrutiny. It bears remembering when evaluating such a statute that the first Texans struck out on their own primarily to escape the distant, surreptitious legislation of a "hostile majority." That species of unseen majoritarianism enjoys no more favor now than it did in 1836.

Having cast their ballots, Texans do not surrender to their public servants the right to decide what citizens should or should not know about how policy is made. They "insist on remaining informed so that they may retain control over the instruments they created." Tex. Gov't Code § 552.001. As stated succinctly by the Texas Supreme Court: "Our citizens are entitled to more than a result," they are privy to "how and why every decision is reached." *Acker*, 790 S.W.2d at 300.

All that section 551.143 denies to government officials is the ability to convene piece-meal quorums for the express purpose of conducting secret deliberations. *See State v. Doyal*, 541 S.W.3d 395, 402 (Tex. App.—Beaumont 2018) *rev'd*, 2019 WL 944022 (Tex. Crim. App. Feb. 27, 2019). The Constitution protects no such right. *See Hays Cty. Water Planning P'ship*, 41 S.W.3d at 182. In

light of the apparently reasonable saving interpretation available, the State's motion is sound, and the requested rehearing should be granted.

Respectfully submitted,

By: */s/Paul C. Watler*
Paul C. Watler
State Bar No. 20931600
pwatler@jw.com
Eric D. Wong
State Bar No. 24102659
ewong@jw.com
JACKSON WALKER L.L.P.
2323 Ross Avenue, Suite 600
Dallas, Texas 75201
(214) 953-6000 / (214) 953-5822 *fax*

COUNSEL FOR AMICUS CURIAE

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief includes 2,201 words (exclusive of words that do not have to be included for word-count purposed) and was produced in 14-point font with 12 point footnotes.

/s/ Paul C. Watler
Paul C. Watler

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing brief was electronically served on counsel of record in accordance with the applicable procedural rules, this 6th day of May, 2019.

/s/ Paul C. Watler
Paul C. Watler